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Office-Supreme Court, U.S.
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NOV 9 1960
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No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
C. GUY TADLOCK,
NORMAN H. WOLFE,
Attorneys,
Department of Justice, Washington 25, D.C.

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Contrary to taxpayer's assertions (Br. 2–4), the Commissioner's petition in this case is not inconsistent with the Government's prior opposition to certiorari in *Weil* v. *Commissioner*, 240 F. 2d 584 (C.A. 2d), certiorari denied, 353 U.S. 958, and *Eisinger* v. *Commissioner*, 250 F. 2d 303 (C.A. 9th), certiorari denied, 356 U.S. 913.

At the time of the *Weil* and *Eisinger* opinions, it was not clear that no factual distinctions could be drawn between the cases decided by the Second and Ninth Circuits. Indeed, in *Eisinger* (250 F. 2d at 306), the Ninth Circuit, though it criticized the language of the Second Circuit in *Weil*, sought to reconcile that case in terms of its particular facts.[1] Con-

[1] Subsequently, the First Circuit, in *Metcalf* v. *Commissioner*, 271 F. 2d 288, 291, took the same view and also reconciled *Deitsch* v. *Commissioner*, 249 F. 2d 534 (C.A. 6th).

sequently, our view at that point was that any seeming conflict of approach was subject to an explanation on the basis of factual differences in the cases.

As our petition states, an express conflict among the Circuits has now crystallized. The conflict does not relate merely to the peculiar terms of a few individual agreements but, as indicated by the extensive pending litigation (see Pet. 7, fn. 7), it concerns the interpretation of a federal tax statute affecting the rights of parties to countless past and future separation agreements and divorce decrees. In its opinion in the present case, the Second Circuit suggests no distinction between the circumstances of *Lester* and those of *Eisinger* and *Metcalf*, but expressly disagrees with the interpretation of the applicable statutory provisions adopted by the Ninth and First Circuits. The conflict which had been lurking behind the prior decisions of the Courts of Appeals has thus become explicit.

It is now apparent, therefore, that contrary to the expressed intention of Congress (see Pet. 8, fn. 8), the income tax consequences of similar separation agreements may differ, depending upon the residence of one or both of the spouses (see Pet. 8, fn. 9). The litigation which has occurred to date shows that uncertainty and inequity inevitably result from divergent interpretations of the statute. We believe, therefore, that the matter is one which should be resolved by this Court.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
C. GUY TADLOCK,
NORMAN H. WOLFE,
Attorneys.

NOVEMBER 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960